

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OAKWOOD HEALTHCARE, INC.
Employer

and

Case 7-RC-22141

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO
Petitioner

BEVERLY ENTERPRISES-MINNESOTA, INC.,
d/b/a/ GOLDEN CREST HEALTHCARE CENTER
Employer

and

Cases 18-RC-16415
18-RC-16416

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC
Petitioner

CROFT METALS, INC.
Employer

and

Case 15-RC-8393

INTERNATIONAL BROTHERHOOD
OF BOILERMAKERS, IRON SHIP
BUILDERS, BLACKSMITHS, FORGERS
AND HELPERS, AFL-CIO

Petitioner

BRIEF AMICI CURIAE AMERICAN HOSPITAL ASSOCIATION,
AMERICAN ORGANIZATION OF NURSE EXECUTIVES, AMERICAN SOCIETY FOR
HEALTHCARE HUMAN RESOURCES ADMINISTRATION, MICHIGAN HEALTH AND
HOSPITAL ASSOCIATION IN RESPONSE TO THE NATIONAL LABOR RELATIONS
BOARD'S JULY 24, 2003, NOTICE AND INVITATION TO FILE BRIEFS

Paul C. Skelly
Amy Folsom Kett
Hogan & Hartson L.L.P.
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-8614
Counsel for Amici Curiae

Date Filed: September 22, 2003

TABLE OF CONTENTS

Page

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
INTRODUCTION AND SUMMARY: WHY THE CHARGE-NURSE ROLE IS IMPORTANT FOR HOSPITALS	3
ARGUMENT	6
I. AS MANAGEMENT'S FRONT-LINE REPRESENTATIVES ON THE UNIT, CHARGE NURSES MAKE IMPORTANT DISCRETIONARY DECISIONS THAT AFFECT PATIENT CARE	6
II. THE DEGREE OF DISCRETION COMMONLY EXERCISED BY CHARGE NURSES IS SUBSTANTIAL	9
III. HOSPITALS NEED TO BE ABLE TO DEPEND UPON THEIR CHARGE NURSES	12

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<u>Brusco Tug & Barge Co. v. NLRB</u> , 247 F.3d 273 (D.C. Cir. 2001)	10
<u>Chevron Shipping Co.</u> , 317 NLRB 379 (1995)	10, 11
<u>Dynamic Science, Inc.</u> , 334 NLRB No. 57, 2001 WL 1219582 (2001)	10, 11
<u>Evergreen New Hope Health & Rehab. Ctr. v.</u> <u>NLRB</u> , 65 Fed. Appx. 624, 2003 WL 21259895 (9th Cir. 2003)	7
<u>Florida Power & Light Co. v. IBEX, Local 641</u> , 417 U.S. 790 (1974)	12
<u>Glenmark Assocs., Inc. v. NLRB</u> , 147 F.3d 333 (4th Cir. 1998)	11
<u>Integrated Health Servs. of Michigan at</u> <u>Riverbend, Inc. v. NLRB</u> , 191 F.3d 703 (6th Cir. 1999)	10
<u>NLRB v. Attleboro Assocs., Ltd.</u> , 176 F.3d 154 (3d Cir. 1999)	10
<u>NLRB v. Health Care & Retirement Corp. of Am.</u> , 511 U.S. 571, 581 (1994)	13
<u>NLRB v. Kentucky River Cmty. Care, Inc.</u> , 532 U.S. 706 (2001)	3
<u>NLRB v. Quinnipiac College</u> , 256 F.3d 68 (2d Cir. 2001)	<u>passim</u>
<u>Providence Alaska Med. Ctr. v. NLRB</u> , 121 F.3d 548 (9th Cir. 1997)	10
<u>Providence Hosp.</u> , 320 NLRB 717 (1996)	7
<u>Schnurmacher Nursing Home v. NLRB</u> , 214 F.3d 260 (2d Cir. 2000)	7

TABLE OF AUTHORITIES (CONT'D)

Page

STATUTES

29 U.S.C. § 152(3) 8

29 U.S.C. § 152(11) 3

OTHER AUTHORITIES

First Consulting Group, The Healthcare Workforce
Shortage and Its Implications for America's
Hospitals (Fall 2001) 8

Webster's Thirds New Int'l Dictionary Unabridged
(1993) 9

Whom Will Care for Each of Us? America's Coming Health
Care Labor Crisis, Univ. of Illinois College of Nursing,
Nursing Inst. (2001) 9

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

OAKWOOD HEALTHCARE, INC.
Employer

and

Case 7-RC-22141

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO
Petitioner

BEVERLY ENTERPRISES-MINNESOTA, INC.,
d/b/a/ GOLDEN CREST HEALTHCARE CENTER
Employer

and

Cases 18-RC-16415
18-RC-16416

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC
Petitioner

CROFT METALS, INC.
Employer

and

Case 15-RC-8393

INTERNATIONAL BROTHERHOOD
OF BOILERMAKERS, IRON SHIP
BUILDERS, BLACKSMITHS, FORGERS
AND HELPERS, AFL-CIO

Petitioner

**BRIEF AMICI CURIAE AMERICAN HOSPITAL ASSOCIATION,
AMERICAN ASSOCIATION OF NURSE EXECUTIVES, AMERICAN SOCIETY FOR
HEALTHCARE HUMAN RESOURCES ADMINISTRATION, MICHIGAN HEALTH AND
HOSPITAL ASSOCIATION IN RESPONSE TO THE NATIONAL LABOR RELATIONS
BOARD'S JULY 24, 2003, NOTICE AND INVITATION TO FILE BRIEFS**

INTEREST OF THE AMICI CURIAE

The American Hospital Association (AHA), founded in
1898, is the national advocacy organization for hospitals in

this country. It represents approximately 5,000 hospitals, health systems, networks, and other care providers. AHA's mission is to promote high-quality health care through leadership and representation of, and service to, healthcare provider organizations committed to meeting the healthcare needs of their communities.

The American Organization of Nurse Executives (AONE) is the voice of nursing leadership representing over 3,900 registered professional nurses in executive practice. AONE members encompass senior healthcare executives, chief nursing officers, clinical nurse managers, educators, consultants, and aspiring nurse leaders dedicated to the advancement of the profession and the promotion of quality patient care and health outcomes.

The American Society for Healthcare Human Resources Administration (ASHHRA) is a personal membership group of the AHA. Founded in 1964 and based at the AHA in Chicago, Illinois, ASHHRA is the nation's premiere professional association for human resources leaders in health care. ASHHRA's mission is to advance excellence and increase competency in human resources leadership in hospitals and healthcare organizations. ASHHRA consists of over 3,000 members and is the only membership organization in the United States dedicated exclusively to the field of professional healthcare human resources management.

The Michigan Health & Hospital Association (MHA) is an association of hospitals, health systems, and other healthcare providers throughout Michigan that work together with patients, communities, and providers to improve health care for all Michigan citizens by addressing current issues that impact on the ability of its members to deliver care. MHA membership includes 144 hospitals, 20 health systems, and nearly 100 other members.

Amici respectfully submit this brief in response to the Board's Notice and Invitation to File Briefs, issued July 24, 2003. The purpose of this brief is to offer the Board guidance in connection with the first question identified in the Notice -- the meaning of the term "independent judgment" in section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11), and the scope of discretion required for independent judgment -- with respect to charge nurses. We have focused our analysis on the first question presented because, following the Supreme Court's decision in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001), that is likely to be the critical inquiry in future charge nurse cases.

**INTRODUCTION AND SUMMARY: WHY THE CHARGE-NURSE ROLE
IS IMPORTANT FOR HOSPITALS**

The contemporary hospital is a community resource organized to care for the sick and injured and improve the

health of the population. Every day, hundreds of thousands of women and men are at work in America's hospitals, caring for millions of patients. Although providing patient care services involves a support system that includes information systems, technology, equipment, and facilities, the foundation for providing care to patients is a hospital's people -- the staff who serve patients 24 hours a day, 7 days a week, 365 days a year.

Health care is not like the manufacturing industry with a carefully planned production schedule. Hospitals never know who or how many patients will walk through their doors on any given day or night. Hospitals have no control over flu outbreaks, highway accidents, or the scores of other emergencies that can erupt on a daily basis. As the largest segment of American health care, hospitals play a special role in treating the most seriously ill and injured patients using the world's most advanced technology.

Countless times a day, every day in today's hospitals, health care is provided through a complex system that involves people, technology, medical devices, and pharmaceuticals. This complexity has mushroomed in the past decade. Hospitals are committed to providing high quality health care to their communities, to improving patient safety, and to working continuously to do so.

In meeting a hospital's commitments to quality care and patient safety, no staff is more important than its nurses. And the charge nurse plays a key role in how the hospital meets those commitments. Whether he or she works in an acute-care facility or a long-term care nursing home, the charge nurse is likely to be the most visible person in the unit. At night and on weekends, the charge nurse is probably the highest-ranking employee on-site. For patients, their families, other staff, and clinicians, he or she is relied on to keep the routine of the unit flowing, to step in when special circumstances arise, to make an assessment, and to make the adjustments with regard to staff and other resources so that patient care needs are met.

Hospitals in America today are facing a critical shortage of nurses -- and particularly experienced nurses -- at a time when the acuity of patients is greater than ever. If charge nurses are not perceived as supervisors with managerial prerogatives, the quality of patient care will suffer, hospitals will continue to experience staff shortages, and the already significant financial burdens on hospitals will increase. Charge nurses' loyalties will be strained, and their already challenging job of ensuring quality care will only become more difficult.

ARGUMENT

I. AS MANAGEMENT'S FRONT-LINE REPRESENTATIVES ON THE UNIT, CHARGE NURSES MAKE IMPORTANT DISCRETIONARY DECISIONS THAT AFFECT PATIENT CARE

The charge nurse's role presumes an education and experience that equip him or her to assume a management function. The charge nurse's background in the hospital's organization and in nursing practice enables him or her to step in when there is crisis or conflict, quickly to assess the situation and identify needed resources, to reallocate if necessary, and to respond to the patient care, personnel or other issues. The driving force behind the charge nurse's response will always be to assure that patient care on the unit is not disrupted and that the unit meets individual patient care needs.

The typical acute-care hospital charge nurse is generally responsible for assigning and re-assigning the nurses and unlicensed personnel in the unit. He or she commonly monitors all the activity on the unit and tracks the acuity of patients on the floor. The charge nurse also evaluates the skills of the nurses and other personnel in the unit and makes staffing decisions based on those assessments. The charge nurse reallocates staff throughout the shift as patient needs and personnel changes require. Charge nurses also direct other employees, sometimes making split-second decisions that can

literally be a matter of life or death. ^{1/} They may also be involved in evaluating staff or recommending discipline.

In the performance of their responsibilities, charge nurses commonly exercise a significant amount of discretion. Suppose, for example, that a personality conflict arises between the unit's most experienced nurse and a critically ill patient whose needs that nurse is best suited to address. Should the charge nurse attempt to mediate the conflict, call outside the unit for a less experienced nurse to assign to the patient, or take on the patient personally? Or assume, as often happens, that there is an unexpected change in a patient's condition. It is the charge nurse who must quickly assess the situation and manage a series of actions that will directly affect a satisfactory or unsatisfactory outcome for the patient. Or suppose there is a community disaster that strains the resources

^{1/} Such decisions, in our view, would fit within the definition of "directing" or "responsibly directing" employees. See, e.g., Schnurmacher Nursing Home v. NLRB, 214 F.3d 260, 268 (2d Cir. 2000). Charge nurses should be found to "responsibly direct" employees whenever they are held accountable for the performance of their units. See, e.g., Evergreen New Hope Health & Rehab. Ctr. v. NLRB, 65 Fed. Appx. 624, 2003 WL 21259895, at *2 (9th Cir. 2003). The Board has never developed a meaningful distinction between the terms "direct" and "assign" in charge nurse cases for purposes of section 2(11). See Providence Hosp., 320 NLRB 717, 727 (1996). We doubt that the distinction, if any, will be relevant to most charge nurse cases, since the supervisory tasks enumerated in section 2(11) are read in the disjunctive, NLRB v. Quinnipiac College, 256 F.3d 68, 74 (2d Cir. 2001), and charge nurses' duties generally will fit easily under one or the other heading.

of several area hospitals at once. During the interim time when there are no reserve nurses to call, or there is no time to call them, how will the charge nurse allocate the staff so that patients receive optimal care?

These are quintessentially judgment calls that the charge nurse alone can make, only after evaluating the varying skills of all of the staff and the varying needs of all of the patients and applying professional knowledge to the particular situation at hand. 2/

That charge nurses will continue to make such important decisions is virtually assured by the challenging environment in which today's hospitals operate. Healthcare institutions are facing a severe shortage of qualified nurses. First Consulting Group, The Healthcare Workforce Shortage and Its Implications for America's Hospitals 4, 7, 10, 15-23 (Fall 2001) [FCG]. 3/ Senior nurses, moreover, are leaving the field at alarming rates, id. at 16, and hospitals are relying increasingly on agency and traveling nurses. Id. at 16-22.

2/ There is no tension between the definition of "supervisor" and the definition of "professional" under the Act. The two terms are independent. If an individual satisfies the definition of "supervisor" under section 2(11) of the Act, he or she is not included within the coverage of the Act. See 29 U.S.C. § 152(3). It matters not that a supervisory role may arise in the context of professional work.

3/ The national mean vacancy rate for nurses is thirteen percent and is increasing. See FCG at 7, 15.

The so-called "graying" of the American population -- a disproportionate growth in the over-65 population, who typically need the most health care -- exacerbates the workforce crisis. See Whom Will Care for Each of Us? America's Coming Health Care Labor Crisis, Univ. of Illinois College of Nursing, Nursing Inst. (2001). Add to this mix the fact that, under managed care, only those patients with the most acute needs remain hospitalized, and the demands facing today's healthcare providers are readily apparent. All of this means that the assignment and decisionmaking work of the charge nurse in the average acute-care hospital in America today is perhaps now more intense and more challenging than ever.

II. THE DEGREE OF DISCRETION COMMONLY EXERCISED BY CHARGE NURSES IS SUBSTANTIAL

The challenges faced by charge nurses in a variety of contexts have been recognized by the federal courts of appeals. Applying the ordinary meaning of the term "independent judgment," ⁴/ the courts have repeatedly held that charge nurses exercise independent judgment when they make decisions based on the changing needs of patients, the skill levels of staff, and

⁴ / The ordinary meaning of "judgment" is "the mental or intellectual process of forming an opinion or evaluation by discerning or comparing." See Webster's Third New Int'l Dictionary Unabridged at 1223 (1993). The ordinary definition of "independent" is "not subject to control by others." Id. at 1148.

other unique circumstances. 5/ In light of Kentucky River, the remaining question is whether charge nurses act with a sufficient "degree of discretion" to qualify for supervisory status under the Act. 532 U.S. at 713 (emphasis in original).

Chevron Shipping Co., 317 NLRB 379 (1995), on which the Kentucky River Court relied, indicates that the threshold level of discretion required for supervisory status is not high. The steam ship "watch officers" in Chevron Shipping were not only limited by their "master's standing orders, and the Operating Regulations," id. at 381, but they also were required to alert senior officers whenever making "any kind of decision affecting the crew or the ship" -- even something as straightforward as "changing the ship's speed." Id. (emphasis added). In other words, these were employees who effectively had no genuine supervisory discretion at all. See also Dynamic

5 / See, e.g., Integrated Health Servs. of Michigan at Riverbend, Inc. v. NLRB, 191 F.3d 703, 710 (6th Cir. 1999) (charge nurses are actually "required to exercise independent judgment" (emphasis in original)); NLRB v. Attleboro Assocs., Ltd., 176 F.3d 154, 168 (3d Cir. 1999) ("[T]he charge nurse considers the needs of the patient, the skills of the staff and the experience of the staff members available. Of course that assignment requires professional judgment. Of course that assignment requires independent judgment" (quoting Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548, 556 (9th Cir. 1997) (Noonan, J., dissenting)). See also Quinnipiac, 256 F.3d at 75. See generally Brusco Tug & Barge Co. v. NLRB, 247 F.3d 273, 278 (D.C. Cir. 2001) ("Courts typically consider assignment based on assessment of a worker's skills to require independent judgment and, therefore, to be supervisory.") (citing court of appeals cases).

Science, Inc., 334 NLRB No. 57, 2001 WL 1219582 (2001) (where artillery testing leaders received detailed assignment sheets, were told precisely when and where equipment was to be set up, were constrained to follow written standard operating procedures provided by equipment manufacturers, and spent most of their time doing exactly same work as rank-and-file testers, record was "devoid of any evidence" of supervisory status).

Chevron Shipping and Dynamic Science serve only to highlight the substantial supervisory authority of the typical charge nurse. To be sure, healthcare institutions -- like military installations and steam ships -- are of necessity highly regulated environments, because the lives and welfare of patients are at stake. But as the Second Circuit, applying Kentucky River, recently observed, "the existence of governing policies and procedures and the exercise of independent judgment are not mutually exclusive." Quinnipiac, 256 F.3d at 75-76. Accord Glenmark Assocs., Inc. v. NLRB, 147 F.3d 333, 341 (4th Cir. 1998) ("The Board mistakenly assumes that because there is an established procedure for handling a particular scheduling situation, nobody is required to think.").

In reality, many of the decisions that a charge nurse is called upon to make in the course of a shift are not easily encompassed within written policies or orders from superiors. The answer to every question that arises will not be found in a

handbook or on a list -- no matter how many the hospital promulgates. The charge nurse is required to draw on his or her education and experience to make often split-second independent decisions with regard to a change in a patient's status, the unit environment or interactions among staff. In emergencies, the charge nurse will have no time to consult written materials. It is hard to imagine how a hospital unit could function if, as in Chevron Shipping, every assignment change or other decision implemented by the charge nurse in the course of a shift had to be reported to upper management.

III. HOSPITALS NEED TO BE ABLE TO DEPEND UPON THEIR CHARGE NURSES

Because they are often the most visible individuals "in charge" of a hospital unit, it is essential that charge nurses perceive themselves, and that others perceive them, as part of hospital management. When critical actions must be taken affecting patient health and safety, management must have confidence that the charge nurse is committed to fulfilling the hospital's mission. Indeed, the very purpose of the NLRA's exemption for supervisors is to ensure that supervisors are not faced with conflicting loyalties between management and unions in the workplace. See Florida Power & Light Co. v. IBEX, Local 641, 417 U.S. 790, 808 (1974) ("Congress sought to assure the

employer of the loyalty of its supervisors by reserving in him the right to refuse to hire union members as supervisors").

To be sure, in the healthcare field, labor and management generally share a common goal -- promoting patient welfare. In times of labor strife, however, healthcare workers, like any other employees, will represent their own interests. When a labor-management conflict arises, it is imperative that the charge nurse -- typically management's first-line supervisor and on-site representative -- can be depended upon to meet the hospital's patient care responsibilities. Where charge nurses are permitted to unionize, they are more likely to align themselves with unionized staff nurses during labor disputes and less likely adequately to monitor and discipline the nurses in the bargaining unit.

Furthermore, nurses and unlicensed personnel sometimes strike, and as a result hospitals may be left understaffed. In these circumstances, it is vitally important that the hospital be able to depend on the loyalty of its charge nurses, who will ensure that patients' needs continue to be met. See NLRB v. Health Care & Retirement Corp. of Am., 511 U.S. 571, 581 (1994) (in order "to implement policies to ensure that patients receive the best possible care despite possible adverse reaction from employees," a health care institution must be able "to insist on the undivided loyalty" of its nurse-supervisors).

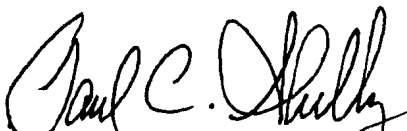
CONCLUSION

The realities of today's complex healthcare environment virtually ensure that charge nurses will be given increasing responsibilities in the upcoming years and that the judgment calls charge nurses will be required to make will become ever more challenging. Amici respectfully request that in developing standards for interpreting the definition of "supervisor" under section 2(11) of the NLRA, the Board recognize the important and unique role of the charge nurse in acute-care hospitals and management's reliance on charge nurses' exercise of independent judgment and discretion on its behalf.

Respectfully submitted,

HOGAN & HARTSON L.L.P.

By



Paul C. Skelly
Amy Folsom Kett
555 13th Street, N.W.
Washington, DC 20004-1109
(202) 637-8614
counsel for Amici Curiae

Dated: September 22, 2003

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2003, copies of the foregoing Brief for Amici Curiae the American Hospital Association, American Organization of Nurse Executives, American Society for Healthcare Human Resources Administration, Michigan Health and Hospital Association in Response to the National Labor Relations Board's July 24, 2003, Notice and Invitation to File Briefs, were served by Federal Express, postage prepaid, on the following counsel:

Blair K. Simmons, Esq.
8000 East Jefferson
Avenue
Detroit, MI 48214

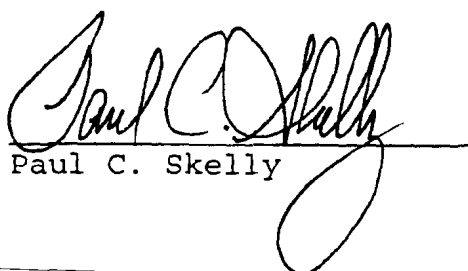
Ronald J. Santo, Esq.
William M. Thacker, Esq.
Claire S. Harrison, Esq.
DYKEMA GOSSETT PLLC
315 E. Eisenhower Pkwy
Suite 100
Ann Arbor, MI 48108

Norman A. Mott III Esq.
Shields Mott Lund LLP
650 Poydras Street,
Suite 2400
New Orleans, LA 70130

Charles Brock
357 Riverside
Drive, Ste. 230-B
Franklin, TN
37064

Thomas R. Trachel, Esq.
Felhaber Larson Fenlon &
Vogt PA
225 South Sixth,
Suite 4200
Minneapolis, MN
55402-0535

Mark W. Bay, Esq.
Peterson Engberg &
Peterson
700 Title Insurance
Building
Minneapolis, MN
55401-2498


Paul C. Skelly